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No. 88-1501

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EASTMAN KODAK COMPANY,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

In this patent infringement action in which there was a lengthy liability trial resulting in a Rule 54(b) judgment in 1985 enjoining Kodak (affirmed on appeal with certiorari denied), should this Court review a decision of the Court of Appeals affirming denial of Kodak's June 15, 1988 motion to vacate the Rule 54(b) judgment and all orders entered by the liability trial judge in this action "from October 4, 1981 to date" because at the outset of that trial on October 5, 1981 she announced that she had learned the day before of her mother-in-law's ownership of some stock in Kodak and that "I do not regard this as disqualifying and at this point will proceed to hear the case"?

Neither party made any reference to or took any action with respect to that announcement until Kodak's motion to vacate, made six and one-half years later and near the conclusion of extensive pretrial preparation for the damages trial, now set to begin May 1, 1989.

STATEMENT PURSUANT TO COURT RULE 28.1

Pursuant to Court Rule 28.1, respondent Polaroid Corporation states that it is a corporation of the State of Delaware. It has no parent company, nor any subsidiaries that are not wholly owned. Its affiliates are Pactide Corporation and PB Diagnostic Systems, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

The position petitioner Eastman Kodak Company ("Kodak") asserts in this case would render all orders of a district judge void ab initio if the judge erred (as the judge in this case did not) in deciding that the interest of a relative could not be substantially affected by the outcome of the litigation. If this position were tenable, it would have been pointless for this Court in *Liljeberg* v. *Health Services Acquisition Corp.*, ___ U.S. ___, 108 S.Ct. 2194 (1988), to make its extended analysis of flexible remedies and the exercise of discretion in granting them.

In the present case, the parties had full knowledge of the allegedly disqualifying circumstance throughout six and one-half years of liability trial, appellate processes, and damages discovery prior to Kodak's motion. The Court of Appeals decision properly rests on the application of this Court's

Liljeberg guidelines to the facts as found in this case. The fairness to Kodak of the prior proceedings, together with the gross injustice to respondent Polaroid Corporation ("Polaroid"), the waste of judicial resources and the loss of public confidence in the judicial process that would result if the motion were granted, militate against granting certiorari here.

STATEMENT OF THE CASE

A. Judge Zobel's Statement On October 5, 1981

In April 1976, Polaroid sued Kodak, which had just entered the instant photography market, for infringement of ten Polaroid patents relating to its integral instant camera and film system. Kodak counterclaimed for a declaratory judgment that various Polaroid patents, including those ten, were invalid, unenforceable and not infringed. After extensive discovery and other pretrial proceedings, trial on the liability issues commenced on October 5, 1981. At the very outset, prior to opening statements, Judge Rya Zobel announced on the record (B2):[1]

> "Before we begin, I should tell you that I have a mother-in-law problem. It is not the sort that Ann Landers would be interested in. But I learned yesterday that my mother-in-law owns a thousand shares of Kodak stock. She has been a stockholder of Kodak for some 50 years. I do not regard this as disqualifying and at this point will proceed to hear the case."[2]

No comment was made by counsel for Kodak or Polaroid and the trial began.

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[1] Throughout this brief, "JA" refers to the joint appendix on the appeal taken below, "P" refers to the petition, and "A", "B", "C", "D", "E" and "F" to the respective sections of the appendix to the petition. Emphasis in quotations is ours throughout, unless otherwise noted.

[2] The local media's reportage on the opening of the liability trial includes a reference to the judge's statement that her mother-in-law owned Kodak stock (JA301, 318). The outcome of that trial, including injunctive relief, received abundant media coverage throughout the nation.

B. The Liability Trial, Rule 54(b) Judgment And Appellate Processes Thereon

The liability trial took 75 days (JA301). On September 13, 1985, Judge Zobel issued a comprehensive memorandum decision holding that Kodak had infringed seven valid and enforceable Polaroid patents and holding against Polaroid on three patents.[3] The memorandum decision discloses the complexity of the technology, of the trial evidence and of the myriad validity and infringement issues. The Court of Appeals for the Federal Circuit, on the liability appeal, complimented Judge Zobel for her analysis and grasp of such a complicated case (789 F.2d at 1557).

Following the memorandum decision, each party submitted a proposed judgment containing the "express determination" required by Rule 54(b), F.R.Civ.P., "that there is no just reason for delay" and the "express direction" required by Rule 54(b) for "the entry of a final judgment as to one or more but fewer than all of the claims" for relief (JA301-02, 327-33). On October 11, 1985, Judge Zobel entered a Rule 54(b) judgment on the liability claims tried, and, at Kodak's request, on another patent previously held invalid on summary judgment, and disposed of Kodak's counterclaim as to the patents adjudicated. The judgment included an injunction against Kodak's continuing to infringe the five valid and enforceable Polaroid patents which had not yet expired. It also stated that the issues of willfulness of infringement, damages, costs and attorney's fees were to be determined in later proceedings (JA270-76). The same day, Judge Zobel issued a Memorandum Of Decision And Order (228 USPQ 305, 342-44; JA302, 335-37) denying Kodak's request to stay the injunction pending appeal of the liability decision.

Kodak appealed from the Rule 54(b) judgment and moved in the Court of Appeals for an order staying the injunction. After full briefing and oral argument on the merits, the Court of Appeals, on January 7, 1986, denied Kodak's

[3] See 641 F.Supp. 828 (D.Mass. 1985), affirmed 789 F.2d 1556 (Fed.Cir. 1986), cert. denied 479 U.S. 850 (1986).

motion for a stay of the injunction.[4] The following day, Justice Powell denied Kodak's further application for a stay (JA302-03, 339). On April 25, 1986, the Court of Appeals issued its detailed opinion unanimously affirming the Rule 54(b) judgment.[5] Kodak's petition for certiorari was denied (JA304, 341).

C. Damages Trial Discovery And Statements By Judge Zobel And Counsel On May 9, 1988

Shortly after entry of the Rule 54(b) judgment, in December 1985, the parties embarked upon an extensive program of discovery in preparation for the damages trial. There had been no previous discovery on damages. Numerous status conferences were held in 1986, 1987 and early 1988 with Judge Zobel. At the March 18, 1988 status conference, she ordered discovery completed by July 29, 1988 and scheduled the damages trial to commence on January 9, 1989 (JA303-07).[6]

At the next pretrial conference, held in chambers on May 9, 1988, Judge Zobel stated that her mother-in-law had died the preceding month, that her mother-in-law's estate included the Kodak stock which she had previously mentioned, that her husband had been named executor of the estate and residuary legatee and that she had received a specific bequest. She informed counsel that because of this recent development, she would disqualify herself from further participation in the case (JA305). In her June 21, 1988 memorandum order recusing herself *nunc pro tunc* May 9, 1988, quoting from 28 U.S.C. § 455(b)(4),[7] Judge Zobel recounted further proceedings at the May 9, 1988 conference (C2):

> "The Court announced that she could not continue to preside over the case and would *sua sponte* recuse herself.

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[4] *Polaroid Corp.* v. *Eastman Kodak Co.*, 833 F.2d 930 (Fed.Cir. 1986).

[5] *Polaroid Corp.* v. *Eastman Kodak Co.*, 789 F.2d 1556 (Fed.Cir. 1986), cert. denied 479 U.S. 850 (1986).

[6] The damages trial has been reset to commence May 1, 1989, before District Judge A. David Mazzone.

[7] As Judge Zobel noted, § 455(b)(4) requires disqualification where a judge or the judge's spouse "has a financial interest in . . . a party to the proceeding . . . " (F1). Section 455(d)(4) defines "financial interest" as

> Counsel for both parties immediately said they would waive any objections to her continued participation. The Court responded that disqualification was mandatory and not waivable. Counsel expressed a desire to have some time for research. The Court, while explicit in her belief that the hunt would be fruitless, acquiesced."

D. Kodak's Motions Of June 15, 1988

Following the May 9, 1988 conference, Kodak reversed the position it expressed to Judge Zobel that she should continue to participate in the case. Kodak did not merely inform Judge Zobel that it now agreed she should recuse herself, allowing her to formalize her announced disqualification. Instead, on June 15, 1988, Kodak filed an "unnecessary motion" (A3) that Judge Zobel be recused from further participation in the action.[8] Kodak's motion to recuse was combined with a motion that there be vacated "all orders entered by Judge Zobel in this action from October 4, 1981 to date, including her decision of

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including "ownership of a legal or equitable interest, however small" (F2). In *Liljeberg*, this Court noted that "§ 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety" (108 S.Ct. at 2202n.8). As Judge Zobel made clear, the 1988 acquisition by her and her husband of interests in her mother-in-law's estate, which included Kodak stock, was the dispositive fact critical to her determination to recuse herself.

As Kodak's own motion recognizes, so long as the Kodak stock was owned by Judge Zobel's mother-in-law, any disqualification was to be determined under § 455(b)(5)(iii). Section 455(b)(5)(iii) does not use the rigid "financial interest" test but rather requires disqualification only if Judge Zobel knew that her mother-in-law had "an interest that could be substantially affected by the outcome of the proceeding" (F1-2), which she stated in October 1981 she did not believe to be the fact.

[8] The Court of Appeals, referring to "the adage that 'no good deed ever goes unpunished' ", chastized Kodak because its brief before that court "leads the reader uninformed of the record to believe Judge Zobel disqualified herself only in response to Kodak's motion" (A3n.3). Kodak, in the Statement of the Case in its present petition (P5-6), again omits any reference to Judge Zobel's statement on May 9, 1988 that she would *sua sponte* recuse herself.

September 13, 1985 . . . and her order of October 11, 1985, enjoining Kodak . . ." (JA291).

In sole support of its motions, Kodak filed an affidavit by one of its counsel, Richard E. Carlton (JA293-95). The affidavit stated that Mr. Carlton's firm, Sullivan & Cromwell, "had primary responsibility for representing Kodak in this litigation since January 1986" (JA293), and that when Judge Zobel at the May 9, 1988 conference referred to the Kodak stock in her mother-in-law's estate and mentioned that this was the stock she had previously advised the parties about, this "was the first time I or my partners in attendance at the conference had heard of this matter" although "Mr. Frank had some recollection of the matter having come up but was unsure of the details" (JA294).[9] Mr. Carlton went on to state that it was Kodak's position not only that the estate's ownership of Kodak stock required Judge Zobel's recusal from further proceedings, but that all orders entered by Judge Zobel since October 4, 1981 must be vacated because: (1) her announcement on October 5, 1981 "that her mother-in-law's ownership of 1,000 shares of Kodak stock did not constitute a disqualifying financial interest was in error under 28 U.S.C. § 455(b)(5)";[10] (2) "the disqualification was not waivable under § 455(e)"; and (3) "in any event, neither party had been given to [sic] opportunity" to waive "nor had done so" (JA295).

At no time prior to its June 15, 1988 motion had Kodak indicated any objection or taken any action questioning Judge

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[9] Robert S. Frank, Jr., of the firm Choate, Hall & Stewart, has been counsel for Kodak in this action from its outset. He has been actively involved in this litigation and invariably present during court proceedings. He was present on the opening day of trial, October 5, 1981, when Judge Zobel made her announcement regarding her mother-in-law's stock (B2). Other counsel for Kodak were also present that day, including in-house counsel, and attorneys from the firm of Kenyon & Kenyon, which was lead counsel for Kodak until Sullivan & Cromwell's appearance (B2). Kenyon & Kenyon continues as counsel of record to this day (JA303-04).

[10] There is no reference to the term "financial interest" in Judge Zobel's October 5, 1981 announcement and, as noted *supra*, pp. 4-5n.7, there is no reference to "financial interest" in § 455(b)(5)(iii). See also *infra*, pp. 19-20n.20.

Zobel's October 5, 1981 decision not to recuse herself (JA305). Judge Zobel understandably stressed this fact in her June 21, 1988 memorandum order.[11]

Judge Zobel did not rule on either of Kodak's motions. After her memorandum order recusing herself, the case was reassigned to Judge A. David Mazzone.

E. Judge Mazzone's Opinion Denying Kodak's Motion To Vacate

On August 11, 1988, after full briefing and submission of affidavit evidence, Judge Mazzone heard argument on Kodak's motion to vacate. In his opinion from the bench (D3-8), in which he "marveled at the work my esteemed colleague did" in trying and deciding the liability case (D3), he denied the motion on three independent grounds:

> (1) he found that Judge Zobel had correctly determined in 1981 that her mother-in-law's ownership of Kodak stock was not disqualifying;
>
> (2) he found that the Rule 54(b) judgment in 1985 was a final judgment within Rule 60(b), whose requirements for setting aside judgments Kodak had failed to meet; and
>
> (3) he found that to grant the motion and require a second liability trial would be inequitable, unfair and

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[11] As summarized by Judge Zobel: when she made her October 5, 1981 announcement, "Kodak did not then object to the Court's participation"; "[t]hroughout the seventy-five days of trial, Kodak's silence continued"; after her September 13, 1985 ruling, "Kodak still remained mute"; upon the issuance of the injunction, "Kodak said nothing about disqualification"; during lengthy appellate processes, "[a]t no point did Kodak call the higher courts' attention [to] the possible need for disqualification"; during ten pretrial conferences over 26 months concerning the damages trial, "Kodak's silence remained unbroken"; upon her announcement after her mother-in-law's death that "she could not continue to preside over the case and would *sua sponte* recuse herself[,] [c]ounsel for both parties immediately said they would waive any objections to her continued participation"; and now, "for the first time since October 5, 1981, Kodak asks [for] recusal" (C1-2).

unwarranted, when the guidelines set forth by this Court in *Liljeberg,* 108 S.Ct. at 2204, for "determining whether a judgment should be vacated for a violation of § 455" were applied to the facts of this case as found by him.

Judge Mazzone granted Kodak's request for certification (JA1) and the Court of Appeals granted Kodak's motion for leave to appeal.

F. The Court Of Appeals Opinion Affirming Denial Of Kodak's Motion To Vacate

On February 17, 1989, the Court of Appeals unanimously affirmed Judge Mazzone (A1-14). The court rejected Kodak's attempt to cast its appeal as directed to whether Judge Zobel had any discretion to make her 1981 determination, and stressed that the issue before the court was whether Judge Mazzone abused his discretion in denying the motion to vacate (A5, 7). It found that because the third basis on which Judge Mazzone had based his decision, i.e., that to vacate Judge Zobel's orders would be inequitable, unfair and unwarranted under *Liljeberg,* "was fully adequate to reflect the absence of abuse of discretion by Judge Mazzone," it need not address Judge Mazzone's other two grounds for denying the motion (A6).[12]

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[12] Notwithstanding that it is inappropriate for the petition to seek review of those other grounds, Kodak's indirect attack on Judge Mazzone's findings with respect to those two grounds with unsupported, incorrect and argumentative assertions in its Statement of the Case warrants a brief response here.

Kodak seeks (P4-5, 13) to exaggerate, out of all proportion, the effect perceivable in 1981 of the outcome of this case upon the Kodak stock owned by Judge Zobel's mother-in-law. Kodak fails to mention, although it was pointed out by the Court of Appeals (A4), that instant photography accounted for only 1.3% to 5.1% of Kodak's total sales in the years 1976 to 1985, that Judge Mazzone found only a "modest amount of Eastman Kodak's revenues" to be involved, and that the 1,000 shares were to be compared to the 162,500,000 shares of Kodak stock outstanding in 1981. Kodak's attempt to assign to the 1,000 shares, as of 1981, a pro rata portion of the treble

The Court of Appeals also rejected as "meritless" arguments by Kodak that *Liljeberg* is irrelevant here because that case "dealt with § 455(a), not 455(b)" and because that case "applies only to motions to vacate final judgments under Fed.R.Civ.P. 60(b)(6)" (A12-13). In addition, it rejected Kodak's arguments that a violation of § 455(b) constituted "an immortal disqualification" (A11) and that the court should "disregard all that has happened during the six and one-half ensuing years and all that Judge Mazzone had to say about Kodak's acquiescence, aging of witnesses, fading of memories, and the unfairness of vacating Judge Zobel's orders and requiring Polaroid to start all over" (A11). The Court of Appeals also pointed out, "There is no evidence, nor does Kodak suggest, nor could it, that Judge Zobel was biased or

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damages now sought by Polaroid ignores the absence in the pleadings of any specification of the amount of damages, the absence of discovery on damages until 1985 and the absence, until 1987, of any submission to the court or any discussion at any status conference, of the amount of damages sought (JA303-09). Furthermore, in its Annual Report for the year 1985, Kodak reported to its shareholders that if its appeal in the liability case were unsuccessful and a damages trial ensued, "[b]ased on the advice of patent counsel retained to represent it in this case, the company does not believe that it is likely the amount of damages that might result will have a material adverse effect on the financial condition of the company" (JA310, 370), a statement repeated in subsequent annual reports (JA310, 377, 381). Last week, Kodak's chairman, Mr. Colby Chandler, was reported by Reuters Information Services, Inc. to have said that Kodak does not expect the case, whatever the outcome, to have a material effect on the company (see Appendix hereto). Kodak's attempt to use the 1985 injunction retroactively to conjure up prejudicial spectres in 1981 of being "forced out of the instant-photography business altogether" and being required "to recall products and to write off plant and equipment at a cost of hundreds of millions of dollars" (P3) is disingenuous. Kodak, in 1985, was enjoined only from infringing five unexpired Polaroid patents. It was free to use non-infringing alternatives, the inventions of expired Polaroid patents, including those held previously infringed, and any inventions Kodak might itself make. Furthermore, the Kodak 1985 Annual Report states that "[t]he Company's withdrawal from instant photography should not be seen as threatening in financial terms or in the technological sense" (JA310, 369).

Kodak's contention (e.g., P4-5n.3) that the Rule 54(b) judgment was not a final judgment within the meaning of Rule 60(b) ignores the "final judgment" wording of Rule 54(b) itself, and much authority to the contrary. See, e.g., 7 *Moore's Federal Practice* ¶ 60.20, p. 60-172 (2d ed. 1948, revised 1987). The Rule 54(b) judgment here was also final as to Kodak's declaratory judgment counterclaim which was extinguished with respect to the seven patents held valid and infringed.

prejudiced, or for any reason failed to conduct a fair trial" (A7n.9).

After applying to the facts of this case the *Liljeberg* guidelines for "determining whether a judgment should be vacated for a violation of § 455," the Court of Appeals affirmed the denial of Kodak's motion (A12, 14).

REASONS FOR DENYING THE WRIT AND SUMMARY OF ARGUMENT

Nothing in this case warrants review on certiorari. There are no special or important reasons why this Court should give petitioner another hearing on matters already considered and correctly decided below. The comprehensive Court of Appeals opinion dealt with and rejected essentially the same arguments Kodak presents anew in its petition.

Judge Mazzone's decision and the Court of Appeals affirmance are sensible and fair and not in conflict with any applicable opinion of this Court or with any decision of another Court of Appeals. No constitutional issue is involved.

The decision below correctly interpreted this Court's opinion in *Liljeberg*. It correctly ruled that *Liljeberg's* guidelines for determining whether vacatur is an appropriate remedy for an alleged violation of 28 U.S.C. § 455 were applicable to a motion to vacate under § 455(b), whether made before or after final judgment. That ruling is in accord with other authority. The court below was also correct in its application of those guidelines to the facts as found in this case and in its decision affirming the denial of Kodak's motion. Every consideration of equity, procedural fairness and regularity, and sound judicial administration militates for the result below and against granting certiorari on the facts of this case.

Kodak's arguments in the petition are based on faulty readings of *Liljeberg*, on faulty readings of the opinion below, on faulty readings of § 455, on incorrect assertions as to Congressional intent, on inapposite authority and on unwarranted disregard of dispositive findings below.

ARGUMENT

A. The Court Of Appeals Decision Is Manifestly Correct

1. The Court Of Appeals Correctly Read *Liljeberg's* Guidelines As Being Applicable To Kodak's Motion

The Court of Appeals decision is based essentially on its interpretation of *Liljeberg,* and on its application to the facts here of the controlling guidelines set forth in *Liljeberg.*

Liljeberg involved violations of 28 U.S.C. § 455(a) and § 455(b)(4) which occurred prior to, but which were discovered by movant after, final judgment. This Court, in affirming, held that use of F.R.Civ.P. 60(b)(6), which it said should only be applied in "extraordinary circumstances", was proper to set aside the judgment, under the facts of that case. The plain language of *Liljeberg,* however, makes clear that this Court used the occasion of that opinion for the salutory purpose of instructing the lower federal courts in broad terms, applicable to any violation of any provision of § 455, with respect to guidelines to be used in determining whether a motion to vacate should be granted. This Court, at the outset of Section IV of its opinion,[13] stated:

> *"Although § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation.* In considering whether a remedy is appropriate, we do well to bear in mind that in many cases — and this is such an example — the Court of Appeals is in a

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[13] Immediately preceding Section IV of its *Liljeberg* opinion, this Court stated: "A conclusion that a statutory violation occurred does not, however, end our inquiry. As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a). It would be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving forgetful judges" (108 S.Ct. at 2203, footnote omitted).

> better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration" (108 S.Ct. at 2203).

Shortly thereafter, before discussing the relevant facts, this Court stated:

> "*We conclude that in determining whether a judgment should be vacated for a violation of § 455, it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.* We must continuously bear in mind that 'to perform its high function in the best way "justice must satisfy the appearance of justice." ' [citing authority]" (108 S.Ct. at 2204).

In its discussion of the facts, this Court recognized that, in addition to a § 455(a) violation, there had been a "separate violation" of § 455(b) (108 S.Ct. at 2206).

In *Liljeberg,* although the motion to vacate was made ten months after affirmance by the Court of Appeals, it was made promptly after respondent had learned of the facts giving rise to the statutory violations. This Court, after noting Rule 60(b)(6) was not being used to circumvent the one-year limitation period of Rule 60(b)(1), stated: "Of particular importance, this is not a case involving neglect or lack of due diligence by respondent. Any such neglect is rather chargeable to Judge Collins" (108 S.Ct. at 2204n.11). After noting that the "violation is neither insubstantial nor excusable" and that relief in that case could make judges more careful in other cases, it stated: "It is therefore appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment" (108 S.Ct. at 2206).

The Court of Appeals opinion in the present case,[14] after "assuming, solely for the purposes of this opinion, that Judge Zobel should have disqualified herself in 1981," states that, in *Liljeberg,* "the Supreme Court has provided the test to be applied" on this motion, quoting the portions emphasized in the quotations above (A11-12). The Court of Appeals opinion also refers to a number of other Courts of Appeals opinions consistent with its view of the law as reflected in *Liljeberg:*

> (1) it notes (A13) that *Parker* v. *Connors Steel Co.,* 855 F.2d 1510, 1527-28 (11 Cir. 1988), rehearing denied en banc 864 F.2d 795 (11 Cir. 1988), "[a]fter concluding that differences between sections 455(a) and 455(b) did not 'preclude the application of harmless error analysis in the context of a 455(b) violation,'" also agreed that, in *Liljeberg,* "'[w]hen the Supreme Court outlined the test for determining whether a judgment should be vacated due to a § 455 violation the Court did not draw any distinction between § 455(a) and § 455(b)'";[15]

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[14] The opinion was written by Chief Judge Markey, former Chairman of The Advisory Committee on Codes of Conduct of the Judicial Conference of the United States, which has for many years advised judges with respect to the proper construction and application of 28 U.S.C. § 455. See, e.g., *In re Cement & Concrete Antitrust Litigation,* 515 F.Supp. 1076, 1082-84 (D.Ariz. 1981), mandamus denied 688 F.2d 1297 (9 Cir. 1982), affirmed for absence of quorum 459 U.S. 1191 (1983).

[15] Besides *Parker,* there is no other reported Court of Appeals opinion interpreting *Liljeberg* on this point. In *Sollenbarger* v. *Mountain States Telephone & Telegraph Co.,* Civil Action No. 87-1485-SC (D.N.M. February 10, 1989), the court recused itself under § 455(b)(4) but refused, in an interlocutory setting, to vacate its prior rulings because to do so after the eight month delay between the judge's disclosure of his stock ownership and defendant's motion to recuse and vacate was not justified under the *Liljeberg* guidelines. The court noted that "movant chose to wait and see how this court would rule before playing its trump card" and added, "This conduct is blameworthy and dilatory and seemingly may implicate" the prohibitions of the model codes of professional conduct and responsibility "to engage in conduct that is prejudicial to the adminstration of justice", and concluded that movant's "attitude leads to a very inefficient use of scarce judicial resources" and that "plaintiffs would be unfairly treated if the prior rulings were vacated".

(2) it refers (A8-11) to several pre-*Liljeberg* opinions of various other Courts of Appeals where equity/fairness considerations, similar to those later articulated in *Liljeberg's* guidelines, were used to deny motions to vacate orders issued by a judge allegedly disqualified in a § 455(b) context; and

(3) it cites (A8, 13) *In re International Business Machines Corp.*, 618 F.2d 923, 932-34 (2 Cir. 1980), as illustrative authority, consistent with *Lilejeberg's* general teachings, that equity/fairness considerations, including waste of judicial resources, are applicable to deny § 455(b) motions made prior to final judgment to vacate interlocutory orders, and notes that "The governing principles of equity and fairness are not affected by the label attached to that sought to be vacated" (A13).[16]

The Court of Appeals was correct in its interpretation of *Liljeberg,* in its ruling that *Liljeberg's* general guidelines for determining motions to vacate were applicable to Kodak's motion, and in its affirmance of the same interpretation and ruling in the District Court (D5).

2. The Court Of Appeals Correctly Applied *Liljeberg's* Guidelines To The Facts Of This Case In Affirming The Denial Of Kodak's Motion

In the District Court, Judge Mazzone made findings on the issue of whether Judge Zobel should have disqualified herself on October 5, 1981. He found that he did not think she was incorrect in concluding there was no violation of the statute,

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[16] Among more recent Court of Appeals opinions to the same effect as *IBM* is *Willner* v. *University of Kansas,* 848 F.2d 1020, 1022-23 (10 Cir. 1988), cert. denied ____ U.S. ____, 109 S.Ct. 797 (1989), in which the petition and brief in opposition discuss *Liljeberg.* In the recent *Sollanberger* District Court opinion, cited *supra,* p. 13n.15, the court stated, "*Liljeberg* provides guidance on the validity of rulings prior to recusal. Although the *Liljeberg* Court's concern was with the validity of a final judgment after the trial court recused, the standard announced should apply to interlocutory orders as well."

and that he thought Kodak, by its silence, had agreed with that view (D6-7). In addition, having previously summarized some of the history of the case (D5-6), Judge Mazzone went on to state that to require a new liability trial now would be unfair, inequitable, "Draconian and unjust, extraordinary" (D8), concluding (D7):

> "[U]nder these circumstances, I cannot find that it is the law that Eastman Kodak obtains a vacation of this case up to this point. I do not think that would be fair, nor do I think it would be equitable to everyone. It simply gives Eastman Kodak another trial and that would not be, in my judgment, the sensible and fair outcome of this case.
>
> "For six and a half years Eastman Kodak has known Judge Zobel's position. Witnesses have aged; memories have faded. Liability was tried in a long complex exhausting effort by all parties. It was appealed; it was affirmed. Years and years have gone by. A modest amount of Eastman Kodak's revenues are involved, I'm informed in the Schwartz affidavit, and I have nothing to contravert that."

In affirming, the Court of Appeals stated (A12):

> "Applying the Court's guidance in *Liljeberg* to the facts of this case, the risk of injustice to the parties weighs far more heavily on Polaroid's side of the scales; there is little or no risk of injustice in other cases, the present denial resting on the specific facts of this case; and the public's confidence in the judicial process is less likely to be undermined when its result is adhered to in repose, and would be more likely to be undermined if the law were to countenance a sundering of the result six and one-half years later on grounds other than the merits."

The Court of Appeals concluded its opinion with the following (A14):

> "No basis exists in law, equity or fairness for giving Kodak an additional bite at the apple. It availed itself

> fully of the judicial process through a fair and complete trial and a full consideration of its arguments on appeal and in its petition for certiorari. It failed to establish invalidity of Polaroid's patents and was found to have infringed those patents. In light of the factors enunciated in *Liljeberg* and the particular facts of this case listed by Judge Mazzone, we agree with his refusal to 'find that it is the law that Eastman Kodak obtains a vacation of this case up to this point' and with his view that a grant of Kodak's motion would not produce a 'sensible and fair outcome of this case.' Accordingly, the denial of Kodak's motion is affirmed."

The Court of Appeals and the District Court were clearly correct in their application of the *Liljeberg* guidelines to the facts of this case and in their denial of Kodak's motion.

To vacate now the Rule 54(b) judgment and all other orders entered by Judge Zobel from October 5, 1981 to May 9, 1988 and to require a new liability trial would be enormously unjust to Polaroid and monstrously wasteful of judicial resources. Vacatur here would constitute a precedent inviting every litigant who might have any basis for arguing disqualification to postpone action to a time in the future best suiting litigation strategy. It would, in this highly publicized case, shake public confidence in the fairness, common sense and integrity of the judicial process and the courts. It would have a demoralizing effect on the entire federal judiciary, whose duties are difficult enough without being sandbagged and without having their hard work negated by parties who, for tactical or other reasons, profess a change of heart regarding disqualification.

B. Petitioner's Arguments Are Manifestly Unsound

Kodak argues that *Liljeberg's* teaching, with respect to guidelines for determining whether a violation of § 455 warrants vacatur, is limited to § 455(a) violations and final judg-

ments.[17] The court below properly rejected those arguments as contradicted by the plain language and sound rationale of *Liljeberg* and by other authority (A12, 13). Kodak's reliance (P14) on *Liljeberg's* reference to the "extraordinary circumstances" needed under Rule 60(b)(6) to grant a motion to reopen "closed litigation" is also misguided. The liability litigation in this case is certainly closed.

To support its unsound argument that the Court of Appeals violated the "no waiver" provision of § 455(e), Kodak misreads both the opinion below and § 455(e) itself. The court below did not, as Kodak would have it (P7), refuse to vacate "*because* Kodak 'remained silent' . . . and displayed 'acquiescence' ", and hold "that Kodak had *in effect waived* what Section 455(e) makes nonwaivable". Kodak is not correct in stating (P9) that the court "attached *decisive* significance to the fact that . . . Kodak 'remained silent,' raised no 'objection,' failed to seek 'mandamus' and indicated 'acquiescence' " and "held, *in effect,* that by silence and acquiescence Kodak *had waived* its right to object to Judge Zobel's violation". The opinion below makes clear that, while "conduct of the movant is a factor in the equity/fairness equation" (A10), the court's affirmance rested on the fairness to Kodak of the prior proceedings and on the injustice to Polaroid, the waste of judicial resources and the adverse impression on the public that would result from granting Kodak's motion. There is no mention in the court's opinion of any "waiver" by Kodak. The motion was not denied on this ground, expressly or implicitly.

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[17] Kodak mischaracterizes (P15) *Liljeberg's* comparison (108 S.Ct. at 2202n.8) between § 455(a) and the "somewhat stricter" § 455(b). As previously noted, *Liljeberg* involved violations of both § 455(a) and § 455(b)(4). The "important differences" noted in *Liljeberg* were not, as Kodak states, between § 455(a) and § 455(b) but "between subsections (a) and (b)(4)," the opinion going on to state (omitted by Kodak) "Most importantly, § 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety." *Liljeberg* did not broadly say, as Kodak states, that disqualification was "waivable under Section 455(a) but nonwaivable under Section 455(b)"; rather, it says that "§ 455(e) specifies that the judge may not accept a waiver" under § 455(b) but "may accept such a waiver" under § 455(a) (108 S.Ct. at 2202n.8).

While narrowing the holding below to alleged "waiver by silence", Kodak improperly seeks to enlarge § 455(e) to prohibit such a holding. Section 455(e) clearly states that the only kind of waiver it prohibits is one which the judge can "accept from the parties"; that is, a waiver which all parties make, expressly, and the judge accepts, affirmatively. Kodak contends that "It can hardly be supposed that Section 455(e) prohibits waiver by affirmative consent yet allows waiver by silence or 'acquiescence' " (P9). Kodak is wrong. Kodak fails to distinguish a waiver from a preclusion based on the injustice and wastefulness which would result if a belated motion to vacate were granted at the request of a party who, treated fairly as the case moved ahead, had remained silent after learning of a § 455 violation. Congress was aware of the distinction and did not foreclose such preclusion.[18] Kodak is not entitled to the retroactive relief it seeks here.

Kodak's arguments (P8-9) that Congress intended a violation of § 455(b) automatically to oust a judge of jurisdiction, and thus to render void all subsequent orders, are incompatible with the statements in *Liljeberg* that § 455 "neither prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purposes of the legislation" (108 S.Ct. at 2203). Kodak's arguments are also undercut by the finding of the court below that "Contrary to Kodak's arguments, Congress did not intend that a violation of § 455 should in itself and automatically deprive the judge of jurisdiction" (A11n.13). Kodak's petition continues to press Kodak's "no jurisdiction" contention (P10-12, 15). It not only relies on a melange of inapposite cases,[19] but fails to cite, much

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[18] See, e.g., *Delesdernier* v. *Porterie*, 666 F.2d 116, 120-23 (5 Cir. 1982); *To Broaden and Clarify the Grounds For Judicial Disqualification: Hearings on S. 1064 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 93rd Cong., 1st Sess. 84 (1971 and 1973), pp. 17-18, 22, 36-37.

[19] It is not necessary to spell out the respects in which each of the authorities cited by Kodak is distinguishable. However, it should be noted here, as it was not in the petition, that in *Wm. Cramp Sons* v. *Curtiss Turbine Co.*, 228 U.S. 645 (1913), the statute *expressly* mandated that no district

less deal with, *United States* v. *Will,* 449 U.S. 200, 211 (1980), called to Kodak's attention below, in which this Court made the following statement:

> "Section 455 of Title 28 neither expressly nor by implication purports to deal with jurisdiction. On its face § 455 provides for disqualification of individual judges under specified circumstances; it does not affect the jursidiction of a court."

Notwithstanding its contention that *Liljeberg* is inapplicable, Kodak attempts to create sympathy for its position, and to place Judge Zobel's ruling outside the "harmless error" doctrine approved in *Liljeberg.* Ignoring the finding below that "There is no evidence, nor does Kodak suggest, nor could it, that Judge Zobel was biased or prejudiced, or for any reason failed to conduct a fair trial" (A7n.9), Kodak impugns Judge Zobel with unsupported accusations, innuendo and misstatements. For example, Kodak speaks of Judge Zobel's orders being "*tainted*" and "entered . . . possibly *as a consequence of*" her violation (P8; see also P14). By misreading § 455(b)(5)(iii),[20] Kodak attacks the court below for uphold-

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judge should sit in the circuit court of appeals on the same matter heard by that judge below; in *U.S.* v. *Gipson,* 835 F.2d 1323, 1325 (10 Cir. 1988), cert. denied ____ U.S. ____, 108 S.Ct. 2038 (1988), the question was whether a guilty plea could be construed to constitute a waiver of denial of recusal under § 455(b), the court holding it could not be because "*In the context of the issue before us,* we believe § 455(e) creates what is tantamount to a 'jurisdictional' limitation"; and in *Moody* v. *Simmons,* 858 F.2d 137 (3 Cir. 1988), cert. denied ____ U.S. ____, 57 U.S.L.Week 3619 (March 20, 1989), the court held that § 455(b) did not apply and that a judge's *declaration of disqualification* effectively recuses him and renders him without power to enter further orders.

[20] Kodak's use in several places (Pi, 13, 16) of the term "financial interest" in referring to Judge Zobel's alleged violation is misleading. Kodak's motion is based on an alleged violation of § 455(b)(5)(iii), which statute section, unlike § 455(b)(4), does not contain this implacable phrase, but instead speaks merely of "an interest that could be substantially affected by the outcome", a discretionary judgment. This distinction, as well as common sense under the facts here, undercuts Kodak's fanciful implication that Judge Zobel may have made incorrect rulings against Kodak because her awareness in 1981 of the "family *financial interests*" might have caused her

ing decisions "made by a judge disqualified under the *financial-interest* provisions of Section 455(b)" and *"infected* by a disqualifying *financial interest"* (P16).[21]

Kodak also errs in stating that "There can be no suggestion that Judge Zobel's Section 455(b) violation was harmless error, nor did the court below treat it as such" (P12). The court stated that it found "persuasive" *Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1527 (11 Cir. 1988), including *Parker's* conclusion "that differences between sections 455(a) and 455(b) did not 'preclude the application of harmless error analysis in the context of a 455(b) violation'" (A13). The court below added in a footnote, "*See* Fed.R.Civ.P. 61" (A13n.5, emphasis by the court), the harmless error rule.

In *Liljeberg*, this Court stated, "the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration" (108 S.Ct. at 2203) and, in affirming, noted that the violation in that case was "neither insubstantial nor excusable" (108 S.Ct. at 2206). In the present case there can be no doubt that, as the court below found, even if a violation were to be assumed (and there was none) it would have been not only insubstantial and excusable, but entirely harmless to Kodak. Every consideration of sound judicial administration militates against granting certiorari here.

" 'to lean over backwards to demonstrate [impartiality], which is not also doing justice' " (P13).

[21] Kodak unfairly maligns Judge Zobel, who on both occasions promptly called to the parties' attention possibly disqualifying circumstances, with its illogical and unbridled assertions that the opinion below "sent an inappropriate message to the federal judiciary: Section 455(b) can be safely disregarded unless one of the parties presses a specific objection" (P8), "improperly relieved the judge of compliance responsibility" (P8-9) and "invites troublesome questions about the integrity of the federal judiciary" (P14).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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APPENDIX

KODAK CHAIRMAN STILL CHALLENGING PATENT RULING

LOS ANGELES, April 6, Reuter—Eastman Kodak Co. (EK) expects to continue to contest a court ruling that it infringed on a patent held by Polaroid Corp. (PRD), Kodak chairman Colby Chandler told a news conference.

Polaroid, in a case filed about 13 years ago, won a liability judgment against Kodak for patent infringement over an instant camera development by Kodak. Damages, however, have yet to be awarded. A separate trial to determine damages is scheduled to start on May 1.

"We still hope for and want an opportunity to continue to argue the merits of our position because we worked as hard and carefully as any company could work to make sure we did not infringe valid patents. And I'm absolutely certain we did not," Chandler said.

Chandler, in comments at a news conference before a speech to a Los Angeles civic group, added, "We're going to pursue actively our position in the case because we believe in defending our actions." In addition to the effect of the ruling on Kodak, Chandler criticiized [sic] the ruling as a step backward in patent law.

"If it is allowed to stand as the first verdict was issued, it changes the interpretation and application of patent law in a very major way," he said. "It moves in the direction from testing the validity of patents by court procedures . . . back to where patents as issued are presumed to be valid."

Such a step would be burdensome to companies wanting to test a patent's validity in order to be able to participate in a particular field, he said.

Despite his concern over the ruling, Chandler noted that Kodak does not expect the case, whatever the outcome, to have a material effect on the company.

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